FILE COPY

Supreme Court, U. S.
FILED
JUL 8 1972
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971
No. 71-1609

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, a public
corporation,

Petitioner,

vs.

KENNETH L. KARST, et al.,

Respondents.

BRIEF FOR RESPONDENT ANGELA Y. DAVIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JOHN T. McTERNAN

3325 Wilshire Boulevard
Suite 901
Los Angeles, Ca. 90010
Telephone: (213) 380-1900

Counsel for Respondent
ANGELA Y. DAVIS

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

No. 71-1609

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, a public
corporation,

Petitioner,

vs.

KENNETH L. KARST, et al.,

Respondents.

BRIEF FOR RESPONDENT ANGELA Y. DAVIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JOHN T. McTERNAN

3325 Wilshire Boulevard
Suite 901
Los Angeles, Ca. 90010
Telephone: (213) 380-1900

Counsel for Respondent
ANGELA Y. DAVIS

TOPICAL INDEX

	Page
Table of Authorities	ii
STATEMENT OF THE CASE	1
ISSUE PRESENTED	4
THE WRIT SHOULD NOT BE GRANTED	5
ARGUMENT	5
1. The Inference of Disqualification to Teach From Mere Membership in the Communist Party Gravely Abridges First Amendment Safeguards	6
2. The Inference of Disqualification to Teach From Mere Membership in the Communist Party Offends Due Process	10
3. This Case is Not Governed by American Communications Association v. Douds, 339 U.S. 382, 94 L.ed. 925 (1950)	16
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page
American Communications Association v. Douds, 339 U.S. 382, 94 L.ed. 925 (1950)	16, 17, 19, 20
Aptheker v. Secretary of State, 378 U.S. 500, 12 L.ed.2d 992 (1964)	11, 12, 13
Baggett v. Bullitt, 377 U.S. 360, 12 L.ed.2d 377 (1964)	10
Bollenbach v. United States, 326 U.S. 607, 90 L.ed. 350 (1945)	14, 15
Bryson v. United States, 396 U.S. 64, 24 L.ed.2d 264 (1969)	20
Elfbrandt v. Russell, 384 U.S. 11, 16 L.ed.2d 321 (1966)	5, 7, 10, 13, 16
Keyishian v. Board of Regents, 385 U.S. 589, 17 L.ed.2d 629 (1967)	5, 6, 7, 10, 16
Manley v. Georgia, 279 U.S. 1, 73 L.ed. 575 (1928)	13
Schneiderman v. United States, 320 U.S. 118, 87 L.ed. 1796 (1942)	12

Cases	Page
Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.ed.2d 796 (1957)	12
Speiser v. Randall, 357 U.S. 513, 2 L.ed.2d 1460 (1958)	15
Tot v. United States, 319 U.S. 463, 87 L.ed. 1519 (1942)	14
United States v. Brown, 381 U.S. 437, 14 L.ed.2d 484 (1965)	17, 19, 20
United States v. Robel, 389 U.S. 258, 19 L.ed.2d 508 (1967)	8, 9, 16
Western A & R Co. v. Henderson, 279 U.S. 639, 73 L.ed. 884 (1928)	14
Wieman v. Updegraff, 344 U.S. 183, 97 L.ed. 216 (1952)	10, 11, 12, 16

Constitution

United States Constitution:	
First Amendment	5-9, 15, 16, 20
Fourteenth Amendment	14

Statutes	Page
Labor Management Relations Act, 1947	
§9(h)	16
Subversive Activities Control Act	
§6	11
29 U.S.C.A. §159(h)	16
50 U.S.C. §784(a)(1)(D)	8
50 U.S.C. §780 et seq. (Subversive Activity Control Act)	8
50 U.S.C. §785	12
Miscellaneous	
New York Feinberg Law	6

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

No. 71-1609

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a public corporation,

Petitioner,

vs.

KENNETH L. KARST, et al.,

Respondents.

BRIEF FOR RESPONDENT ANGELA Y. DAVIS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's cursory statement of the case omits important facts and seriously blurs the issue. Respondent Davis was a member of the faculty at U.C.L.A. when Petitioner, by virtue of its long-standing

policy not to employ members of the Communist Party,[1] made inquiry of her concerning her alleged membership in the Party. She replied by letter to the effect that she was a member of the Communist Party and that this membership carried with it no commitment at war with her professional responsibilities.(C.T. 10, 11). Thereafter Petitioner directed that proceedings to effect Respondent Davis' termination be instituted. Both The Regents' resolution to this effect (C.T. 14; Pet.App. pp. xxxv-xxxvi) and President Hitch's Statement of Charges initiating the termination proceedings (C.T. 12) make abundantly plain that Davis' termination was intended solely by reason of her membership in the Communist Party. Neither in the charges made nor at any stage in the termination proceeding (to the point where the same was ended by the trial court's judgment) was any issue tendered or evidence received concerning Miss Davis' personal conduct as a teacher

---

1/ The Regents' resolutions to this effect will be found at C.T. 172, 173, 174. They are also set out as Exhibits A, B, C and D attached to the judgment of the trial court, Pet.App. pp. xxviii to xxxvi.

or scholar or her personal characteristics as respects her fitness to teach. Contrary to the implications in the language of Mr. Justice Allport quoted by Petitioner (Pet. p. 4) the termination proceedings would not and could not have constituted "plenary examination of the communist dogma, its objectives and the conduct of the Communist Party member in connection therewith while on the teaching faculty of the University . . .".

It was after the initiation of these termination proceedings that the instant action was brought. The Complaint (C.T. 1-14) sought a declaration that The Regents' resolutions were unconstitutional because they forbade employment of communists by the University solely because of their membership in the Communist Party, and an injunction against implementation of those resolutions on account of their constitutional infirmities. Respondent Davis' Complaint in Intervention (C.T. 29-37) was bottomed upon the same grounds and sought relief that was similar but which extended to forbidding interference with her rights and privileges as a member of the U.C.L.A.

faculty. The two judgments below (C.T. 169, 178) declared The Regents' resolutions unconstitutional because they barred employment on grounds of membership in the Communist Party standing alone and forbade termination proceedings grounded solely on such membership. Plainly these judgments would not bar the University from terminating Respondent Davis for "conduct" as a "Communist Party member" in connection with "communist dogma" while "on the teaching faculty of the University" if the same were such as to disqualify her. But to terminate Davis upon such grounds would have required different charges and a different hearing. Charges of this kind were never made.

ISSUE PRESENTED

The issue here, then, is whether Petitioner can deny employment to a member of its faculty solely by reason of membership in the Communist Party standing alone. Petitioner here, as well as below and in the termination proceedings against Respondent Davis, would draw inferences of lack of academic integrity and opposition to the principles of academic freedom from the

mere fact of such membership. Thus, in a more refined and precise form, the question is whether, consistent with First Amendment freedoms and rudimentary due process, Petitioner can deny employment to a member of its faculty by drawing against such member the inferences just stated from the mere fact of her membership in the Communist Party.

THE WRIT SHOULD NOT BE GRANTED

There are no reasons for granting the writ. The constitutional principles governing this case have been long determined by this Court. The majority below found this to be "manifest" from this Court's decisions in Keyishian v. Board of Regents, 385 U.S. 589, 17 L.ed.2d 629 (1967) and Elfbrandt v. Russell, 384 U.S. 11, 16 L.ed.2d 321 (1966).

ARGUMENT

Petitioner's position rests upon the thesis that while the requirements of the First Amendment and due process forbid inferring "disloyalty" from mere membership

in the Communist Party, they do not prevent inferring academic disqualification from such membership. The short answer is that the Constitution forbids drawing any inferences of individual disqualification from such membership. Guilt by association chills free speech and offends due process.

1. The Inference of Disqualification to Teach From Mere Membership in the Communist Party Gravely Abridges First Amendment Safeguards.

Keyishian v. Board of Regents, 385 U.S. 589, 17 L.ed.2d 629, involved provisions of the New York Feinberg Law which made Communist Party membership as such prima facie evidence of disqualification of teachers in the State University of New York, as well as other state-owned and operated institutions of higher learning. There is nothing in the Court's opinion to indicate that this proscription was based or justified on "loyalty" considerations alone. This Court weighed its constitutional validity in relation to the qualifications to teach "captive audiences of young minds" and its

"stifling effect on the academic mind." (385 U.S. at 607, 17 L.ed.2d at 643.) The objectives of the New York Regents were (as are those of the California Regents here) the "elimination and non-appointment of 'Communists' from or to our teaching ranks." (385 U.S. at 608, 17 L.ed.2d at 644.) The statute was held to be overbroad for the very reason that it permitted mere membership to be the basis for inferring that a particular individual had characteristics disqualifying him to teach. In this form the Court found the statute offensive to the First Amendment guarantee of free association and free expression. The Court held that the statute could not make membership a basis for denial of any public position unless that membership was related to knowledge of unlawful organizational goals and a "'specific intent' to further the illegal aims of the organization." (385 U.S. at 607, 610, 17 L.ed.2d at 643, 644.)

To the same effect upon undistinguishable facts is Elfbrandt v. Russell, 384 U.S. 11, 16, 19, 16 L.ed.2d 321, 324-326. Both cases rest upon the principle that

membership may be innocent and the only kind of membership which can, consistent with the First Amendment, disqualify for public employment is that accompanied with specific intent to further illegal aims of the organization in question.

In United States v. Robel, 389 U.S. 258, 19 L.ed.2d 508 (1967), it was held impermissible on First Amendment grounds to convict a member of the Communist Party for remaining in employment in a defense facility following a finding under the Subversive Activities Control Act (50 U.S.C. §780 et seq.) that the Communist Party was a Communist action organization and under final order to register as such pursuant to that statute. The individual was charged with violation of 50 U.S.C. §784(a)(1)(D) by reason of having continued his employment at a shipyard in Seattle while a member of the Communist Party. The section was held to contain the "fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." (389 U.S. at 266, 19 L.ed.2d at 515.) The

overbreadth lay in the fact that the statute's prohibition was not limited to membership accompanied with specific intent to further unlawful goals. Lacking this limitation the statute was held to impinge fatally upon the "individual's right of association which is protected by the provisions of the First Amendment." (389 U.S. at 263, 266, 19 L.ed.2d at 513, 515.) The essence of the holding, then, is that the First Amendment forbids drawing against the individual inferences of proscribable purpose which had been found against the organization when those inferences are based only on his membership. To hold otherwise would establish "guilt by association alone." (389 U.S. at 265, 19 L.ed.2d at 515.)

The evil of overly broad rules disqualifying for employment or visiting other sanctions on grounds of mere membership in the Communist Party lies in more than the sanction visited upon the individual victim. The overbreadth so chills the exercise of First Amendment freedoms as seriously to impair them for all who fall within its sweep, actual or potential. Thus people

generally will refrain from associations that may bring them within the ambit of the rule in question. Keyishian v. Board of Regents, 385 U.S. at 609, 17 L.ed.2d at 644; Baggett v. Bullitt, 377 U.S. 360, 373, 12 L.ed.2d 377, 385 (1964); Elfbrandt v. Russell, 384 U.S. 11,16-17, 16 L.ed.2d 321,325.

2. The Inference of Disqualification to Teach From Mere Membership in the Communist Party Offends Due Process.

Overbreadth in the terms discussed above also deprives its victim of due process. As was held in Wieman v. Updegraf, 344 U.S. 183, 190-191, 97 L.ed. 216, 222 (1952), where "membership alone disqualifies" there is "[i]ndiscriminate classification of innocent with knowing activity" and is fatal as "an assertion of arbitrary power" which "offends due process." There state college teachers who had refused to take an oath of non-membership in specified organizations, which was not limited to their knowledge of improper objectives on the part of any of the organizations, were later refused an opportunity to take the oath (and thus

continue in their employment) when the highest State court had glossed upon it the element of the oath-taker's knowledge of proscribable objectives. This Court held that innocent and knowing activity had thus been indiscriminately given the same consequences. As such "[t]he oath offends due process." (344 U.S. at 191, 97 L.ed. at 222.) The decision thus is that before the individual's liberties may be abridged due process requires proof that he personally intends or engages in conduct to achieve the proscribed objectives, and that this proof can not be supplied by inference drawn only from his mere membership in an organization said to have those objectives. As the course of decision developed this principle was extended to membership in organizations found in quasi-judicial proceedings to have such objectives.

That development was reached in Aptheker v. Secretary of State, 378 U.S. 500, 12 L. ed.2d 992 (1964). There the Secretary of State had revoked passports of two admitted "top-ranking leaders" of the Communist Party (378 U.S. at 515, 12 L.ed.2d at 1002) under §6 of the Subversive Activities

Control Act (50 U.S.C. §785) solely on the ground of their membership in that organization. (378 U.S. at 504, 12 L.ed.2d at 996.) Relying specifically on the principle of Wieman v. Updegraf, supra, the Court struck down the Secretary's action as a denial of due process. It held that when the mere fact of an individual's membership in a group "has been made the sole criterion for limiting the individual's freedom" this constitutes "indiscriminate classification of innocent with knowing activity." (378 U.S. at 510, 12 L.ed.2d at 1000.) To make plain the significance of its holding the Court observed that by making mere membership the grounds for passport revocation the statute created "an irrebuttable presumption that individuals who are members of the specified organization will, if given passports, engage in activities inimical to the security of the United States." (378 U.S. at 511, 12 L.ed.2d at 1000.) This was held contrary to the teaching of Schneiderman v. United States, 320 U.S. 118, 136, 87 L.ed. 1796, 1808 (1942) and Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.ed.2d 796 (1957) that even where the organization has improper objectives it can not

be "automatically inferred" that all members share them. Further in Aptheker, the Court held that to sustain the revocation proof was needed, related to the individual personally, concerning his specific intent and his purposes in traveling. (378 U.S. at 511, 12 L.ed.2d at 1000, 1001.)

The effect of the Petitioner's rule against communists as applied in this case is also similar to that involved in Elfbrandt v. Russell, supra; it imposes "a conclusive presumption that the member shares the unlawful aims of the organization." (384 U.S. at 17, 16 L.ed.2d at 325.) The establishment of such a presumption rests upon irrational inferences that contravene due process of law.

A state may make proof of one fact the basis for inference of the ultimate fact in issue only where there is a rational connection between what is proved and what is to be inferred. Where such rational connection is lacking the statute violates due process. Manley v. Georgia, 279 U.S. 1, 73 L.ed. 575 (1928). In that case a state statute provided that the fact of insolvency of a bank gave rise to the presumption of fraud on the

part of its officers. The rational connection was held lacking for obviously bank failures occur without fraud by management. In Western A & R Co. v. Henderson, 279 U.S. 639, 73 L.ed. 884 (1928), the fact of a grade crossing collision causing death was by statute made the basis for inferring negligence against the employees of the railroad. This interference was held to contravene normal experience because such collisions may well be caused by the negligence of the traveler on the highway or without the fault of anyone. Since the presumption was arbitrary it operated to deny fair opportunity to repel it; the statute violated the due process clause of the Fourteenth Amendment. (279 U.S. at 642, 73 L.ed. at 888.) See also Tot v. United States, 319 U.S. 463, 87 L.ed. 1519 (1942) (statutory presumption that the possession of a firearm or ammunition by a person who had been convicted of a crime of violence or was a fugitive from justice was presumptive evidence that he had shipped, transported or received the same in interstate commerce, held to be arbitrary and violative of due process); Bollenbach v. United States,

326 U.S. 607, 90 L.ed. 350 (1945) (statute created presumption that mere possession of private property that had been stolen in another state gave rise to the presumption that the possessor was involved in the interstate transportation thereof; held arbitrary and violative of due process.)

Where the presumption is made merely rebuttable but operates in areas protected by the First Amendment, such as membership and association, it is impermissible. For even so limited a presumption in these circumstances shifts to the member a burden too close to that of proving that his First Amendment exercise was in fact innocent and affords no basis of adverse inferences against him. So operative, the presumption violates due process and impedes First Amendment liberty. Speiser v. Randall, 357 U.S. 513, 529, 2 L.ed.2d 1460, 1475 (1958).

3. This Case is Not Governed by American Communications Association v. Douds, 339 U.S. 382, 94 L.ed. 925 (1950).

In Douds the requirement of §9(h) of the Labor Management Relations Act, 1947 (29 U.S.C.A. 159(h)) that union officers file non-Communist affidavits was upheld against attack based on the First Amendment and on the Bill of Attainder clause.[2/] The First Amendment aspects of that opinion have never been explicitly overruled. but surely the later course of decision has eviscerated that holding. The thesis that Congress could properly conclude that union officers who were members of the Communist Party are "likely" to use their positions to bring about political strikes for revolutionary objectives (339 U.S. at 390-391, 94 L.ed. at 939-940) will not stand against the rationale of Keyishian, Elfbrandt, Robel, and Wieman, supra, that organizational

2/ The statute was also held not to be void for vagueness in failing to give fair warning of the offense defined (339 U.S. at 412-413, 94 L.ed. at 951-952.) This point is not involved in the case at bar.

objectives can not be inferred against a member solely by virtue of his maked membership. Douds contradicts the Schneiderman rubric that membership may be innocent and the teaching of Wieman that to classify innocent with knowing activity is "arbitrary." Douds significantly makes no inference to Schneiderman and Wieman was decided after Douds -- as were the other cases cited just above.

Whatever the vitality of Douds, this Court has in United States v. Brown, 381 U.S. 437, 14 L.ed.2d 484 (1965) made it unequivocally plain that it will not permit the inference-from-mere-membership that Petitioner seeks to make here. The Brown reasoning is the more pertinent because it draws upon the very "'overbroadness' cases" (381 U.S. at 456, n. 31, 14 L.ed.2d 496, n. 31) utilized in the foregoing argument:

> "In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list

of undesirable characteristics. For, as the Court noted in Scheiderman v. United States, 320 U.S. 118, 136, 87 L.ed. 1796, 1808, 63 S.Ct. 1333, 'under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.' Just last Term, in Aptheker v. Secretary of State, 378 U.S. 500, 12 L.ed.2d 992, 84 S.Ct. 1659, we held §6 of the Subversive Activities Control Act to violate the Constitution because it 'too broadly and indiscriminately' restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that §6 inflicted its deprivation upon all members of Communist organizations without regard to whether there existed any demonstrable relationship between the charactertistics of the

person involved and the evil Congress sought to eliminate. Id., at 509-511, 12 L.ed.2d at 999, 1000. These cases are relevant to the question before us. Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, 'it cannot automatically be inferred that all members share[e] their evil purposes or participate[e] in their illegal conduct.' " (381 U.S. at 455-456, n. 31, 14 L.ed.2d 495-496.)

While Brown distinguished Douds (381 U.S. at 457-458, 14 L.ed.2d 496-497) it did so on the question of Bill of Attainder. But the reasoning just quoted, premised on the very concept of overbreadth urged here, of necessity applies far beyond the confines of Bill of Attainder. As we read the Court's reasoning in context the opinion says that because such overbreadth suffers from the constitutional and logical infirmities presented in the language quoted the term "members of the Communist Party" could not be read as "shorthand" compendium of

constitutionally proscribable characteristics. This conclusion, it seems plain, rests on the conclusion that it is a "fallacy" to assume that one member of an organization has the characteristics attributed to the organization. The characteristics of the individual are to be proven factually, not inferred from his membership. Brown, then, wrote law wholly inconsistent with the First Amendment sections of the Douds opinion. But that added nothing really new for the same had already been done by the cases cited in Points 1 and 2, ante.

In these lights the reservation in the Bryson v. United States, 396 U.S. 64, 24 L.ed.2d 264 (1969) opinion concerning the vitality, if any, of Douds (396 U.S. at 68, 24 L.ed.2d at 268) have no relevance here. For that statement was made with reference to Bill of Attainder, a point which the Court declined to decide and which is not presented here, and the case was decided on the wholly different and unrelated grounds that unconstitutionally will not be heard to excuse voluntary deceit. (Idem.)

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN T. McTERNAN

Attorney for Respondent
ANGELA Y. DAVIS

ADDENDUM

As this brief was at the printer's, counsel learned of this Court's decision in Healy v. James, No. 71-452, dc. 6-26-72, 40 L.W. 4887. Involving the refusal of "official recognition" to a chapter of Students for a Democratic Society by a state college, the decision determines issues apposite to this case and re-enunciates the principles of First Amendment overbreadth invoked above. The Court specifically addressed itself (40 L.W. at 4892) to the question whether a local campus chapter of S.D.S. could be refused recognition because of its connection with national S.D.S. The latter organization

had been "found" by a Congressional Committee to have engaged in "violent and disruptive" activities and to have had affiliations with local campus chapters embracing recognition of the latter by the national organization and cooperation between the two. (48 L.W. at 4890.) There was no showing that the local chapter there involved was committed to implementation of unlawful aims attributed to the national organization. Upon such a record it was held that the principles of Robel, Keyishian and Elfbrandt apply so as to require proof of specific intent to effectuate such aims before First Amendment liberties may be abridged:

> "Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. See, e.g., United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of

Regents, 385 U.S. 589, 605-610 (1967); Elfbrandt v.Russell, 384 U.S. 11 (1966); Scales v. United States, 367 U.S. 203 (1961). In these cases it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights. United States v. Robel, 389 U.S. at 265. The Government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."

The decision, we submit, controls here as do the authorities it cites. It again shows the inapplicability to this case of the Douds opinion. The rejection of guilt by association invoked here by Petitioner is surely by now firmly and irrevocably rejected.

The Court's further holding in Healy that the state college may not consistent with the First Amendment refuse "recognition" to an organization whose philosophy it dislikes or abhors, speaks to the implicit premise of Petitioner's position here. Petitioner may not deny employment to those whose views it rejects.

THE BRIEF SHOP
legal printers

10844 VENTURA BLVD.,
POPLAR 3-2965

NORTH HOLLYWOOD
TRIANGLE 7-8620